

1 THE HONORABLE THOMAS S. ZILLY
2
3
4
5
6

7 **UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON**

8 GLACIER NORTHWEST, INC.,

9 Plaintiff,

10 v.

11 CEMENTAID INTERNATIONAL
12 MARKETING LTD.,

13 Defendant.

14 Case No. 2:18-cv-00556-TSZ

15 **CEMENTAID INTERNATIONAL
MARKETING LTD.'S MOTION TO
DISMISS GLACIER NORTHWEST,
INC.'S AMENDED COMPLAINT**

16
17
18
19
20
21
22
23
24
25
26
27
NOTE ON MOTION CALENDAR:
DECEMBER 14, 2018

1

2 **TABLE OF CONTENTS**

3

4	I. Introduction.....	1
5	II. Factual Background	2
6	A. The Agreement Between Cementaid And Glacier.....	2
7	B. The Allegations In The Complaint	3
8	III. Legal Standard	4
9	IV. Glacier's Second And Fourth Causes Of Action For Breach Of Contract Should Be	
10	Dismissed Because Glacier Has Not Pled Any Facts Showing That Cementaid	
11	Breached A Duty Imposed By The Agreement	5
12	A. Glacier Has Not Pled Any Facts Showing That The Underlying Proceedings	
13	Raise A Product Liability Claim That Would Invoke Cementaid's Alleged	
14	Duty To Defend	6
15	B. Glacier Has Not Pled Any Facts Showing That The Duty To Defend And The	
16	Duty To Indemnify Have Arisen	8
17	1. Glacier Cannot Plead A Breach Of The Duty To Defend Because The	
18	Complaint Contains No Facts Demonstrating That Liability Would	
19	Eventually Fall On Cementaid.....	9
20	2. Glacier Cannot Plead A Breach Of The Duty To Indemnify Because	
21	The Parties In The Underlying Action Have Not Prevailed	11
22	V. In The Absence of A Cause Of Action For Breach Of Contract, Glacier's First And	
23	Third Causes Of Action For Declaratory Judgment Must Be Dismissed.....	12
24	VI. Conclusion	12
25		
26		
27		

1

2 **TABLE OF AUTHORITIES**

3

	Page(s)
Cases	
<i>Adams v. Johnson</i> , 355 F.3d 1179 (9th Cir. 2004)	4
<i>Ashcroft v. Iqbal</i> , 556 U.S. 662 (2009).....	4
<i>Ballard Residential, LLC v. Pac. Rim Framing Co., Inc.</i> , 149 Wash. App. 1060 (Wash. Ct. App. 2009) (unpublished).....	9
<i>Bell Atl. Corp. v. Twombly</i> , 550 U.S. 544 (2007).....	4
<i>Calkins v. Lorain Div. of Koehring Co.</i> , 26 Wash. App. 206 (Wash. Ct. App. 1980)	5
<i>Cascade Designs Inc., v. Windcatcher Tech. LLC</i> , Case No. C15-1310, 2016 WL 374564 (W.D. Wash. Feb. 1, 2016)	4, 5
<i>Dixon v. Fiat-Roosevelt Motors, Inc.</i> , 8 Wash. App. 689 (Wash. Ct. App. 1973)	9, 10
<i>Dri-Eaz Prods., Inc., v. Dan Duc Nguyen</i> , Case No. C11-1654Z, 2012 WL 1537598 (W.D. Wash. May 1, 2012).....	4
<i>Hay v. Tollen</i> , 4 Wash. App. 2d 1036 (Wash. Ct. App. 2018) (unpublished).....	8, 9
<i>Hummel v. Nw. Tr. Servs., Inc.</i> , 180 F. Supp. 3d 798, 810 (W.D. Wash. 2016).....	12
<i>Knipschield v. C-J Recreation, Inc.</i> , 74 Wash. App. 212 (Wash. Ct. App. 1994)	5, 8, 9, 11
<i>Krasucki v. Nationstar Mortg., LLC</i> , Case No. C15-0229JLR, 2015 WL 11251850 (W.D. Wash. July 8, 2015).....	12
<i>Lemberg v. JPMorgan Chase Bank, N.A.</i> , Case No. 17-cv-05241, 2018 WL 1046886 (N.D. Cal. Feb. 26, 2018)	6
<i>Minnick v. Clearwire US, LLC</i> , 683 F. Supp. 2d 1179 (W.D. Wash. 2010).....	12

1	<i>Mountain Club Owner's Assoc. v. Graybar Elec. Co., Inc.,</i> Case No. No. 2:13-1835, 2014 WL 130767 (E.D. Cal. Jan. 14, 2014).....	6, 7
2	<i>Myers v. State,</i> 152 Wash. App. 823 (Wash. Ct. App. 2009)	5
3	<i>Parks v. W. Wash. Fair Ass'n,</i> 15 Wash. App. 852 (Wash. Ct. App. 1976)	8, 11
4		
5	Rules	
6	Fed. R. Civ. P. 12(b)(6).....	2, 4, 12
7		
8		
9		
10		
11		
12		
13		
14		
15		
16		
17		
18		
19		
20		
21		
22		
23		
24		
25		
26		
27		

1

2 **I. Introduction**

3 In this case, Glacier Northwest, Inc. (“Glacier”) attempts to impose upon Cementaid
 4 International Marketing, Ltd. (“Cementaid”) a non-existent duty to indemnify and defend Glacier
 5 in two separate California lawsuits. The two lawsuits, which are ongoing, involve purported
 6 construction defects on two large scale residential projects (the “Millennium Tower Action” and
 7 the “Axis Action,” collectively, the “Projects”). Although Cementaid—a Hong Kong Company—
 8 might have manufactured cement waterproofing additives that were used in one or both Projects,
 9 Cementaid’s additives do not appear to have any connection with the alleged construction defects.

10 Glacier stretched halfway around the world to reach Cementaid, apparently in search of
 11 coverage for its defense costs and for indemnification; however, the threadbare allegations in
 12 Glacier’s Amended Complaint (“Complaint”) fall woefully short of stating a viable claim. Indeed,
 13 not only does the Complaint fail to state any facts supporting a claim for breach of contract and
 14 declaratory judgment, but the limited allegations provided in the Complaint demonstrate that
 15 Glacier cannot do so.

16 Glacier’s claims are based on a Marketing and Material Supply Agreement (“Agreement”),
 17 executed nearly seventeen years ago (which Glacier fails to attach to the Complaint). The terms of
 18 the Agreement that Glacier cites are, on their own, fatal to its claims against Cementaid. As Glacier
 19 acknowledges, the Agreement specifically limits Cementaid’s indemnification obligations to
 20 “product liability claims.” Complaint ¶ 9. The Complaint, however, fails to allege that the
 21 plaintiffs in the Millennium Tower and Axis Actions—or Webcor Construction LP (“Webcor”),
 22 which filed cross-complaints against Glacier in those actions—have asserted a product liability
 23 claim against Glacier. In fact, the complaints and cross-complaints in the Millennium Tower and
 24 Axis Actions do not identify a single Glacier (or Cementaid) product that was used at the Projects
 25 and they do not assert product liability claims against any party at all. In spite of its months-long
 26 involvement in both the Millennium Tower and Axis Actions, Glacier failed to associate any of the
 27

1 purported Project construction defects with a product liability claim that could be asserted against
 2 Cementaid. For this reason, the Complaint must be dismissed.

3 Even if a product liability claim could be inferred from the Complaint, it is still devoid of
 4 any factual allegations that could support a duty to defend or indemnify. Specifically, Glacier has
 5 not pled facts sufficient to create a plausible inference that liability would necessarily and
 6 eventually fall on Cementaid, thereby giving rise to a duty to defend. Nor can Glacier do so. And
 7 because the Millennium Tower and Axis Actions are ongoing, Glacier cannot plead a necessary
 8 predicate for an indemnity claim; namely, that the plaintiffs and/or Webcor have prevailed on any
 9 claims asserted against Glacier.

10 Accordingly, because Glacier has not plausibly alleged that Cementaid has a duty to defend
 11 or indemnify Glacier, its purported causes of action for breach of contract and declaratory judgment
 12 fail. Pursuant to Federal Rule of Civil Procedure 12(b)(6), Cementaid therefore moves to dismiss
 13 the Complaint for failure to state a claim upon which relief can be granted.

14 **II. Factual Background**

15 **A. The Agreement Between Cementaid And Glacier**

16 The Agreement between Cementaid and Glacier (dated December 31, 2001) gives Glacier
 17 rights to distribute certain concrete additives, admixtures, and surface treatments within certain
 18 portions of the United States. *See Declaration of Jared Schuettenhelm (“Schuettenhelm Decl.”) ¶¶*
 19 4, 5. Notwithstanding these distribution rights, the Agreement makes clear that the relationship
 20 between Cementaid and Glacier is “that of independent contractors,” and thus is “not [to] be
 21 construed to create a partnership, joint venture, agency, franchise or other relationship.” *Id.* ¶ 7.
 22 The independent nature of this relationship is affirmed by the fact that “[n]either party shall have
 23 authority to create, or to assume in the name of the other party or on its behalf, any obligations,
 24 express or implied for any purpose.” *Id.*

25 The Agreement also contains indemnity provisions, which are triggered by a limited number
 26 of specific potential claims. As Glacier acknowledges, Cementaid’s limited indemnification
 27 obligation is triggered by “product liability claims related to the Cementaid products.”

1 Complaint ¶ 9. In contrast, Glacier is solely liable—and must indemnify Cementaid—for “all
 2 claims, actions, damages, liabilities, [and] expenses” arising from or occasioned by Glacier’s acts,
 3 both intentional and negligent, relating to Glacier’s “shipping, transport, storage, distribution, sale
 4 or use” of Cementaid’s products. Schuettenhelm Decl. ¶ 6. Notably, Glacier acknowledges that its
 5 connection to the Millennium Tower and Axis Actions involves “the sale of Cementaid’s product
 6 to Central Concrete.” Complaint ¶¶ 8, 13. Thus, on its face the Complaint demonstrates that the
 7 Millennium Tower and Axis Actions involve matters (i.e., Glacier’s sale of products) that
 8 potentially fall under Glacier’s sole liability, and for which Glacier must pay any defense costs for
 9 and indemnify Cementaid.

10 **B. The Allegations In The Complaint**

11 While Glacier summarily and self-servingly concludes that the Millennium Tower and Axis
 12 Actions involve “product liability claims,” it fails to plead any facts showing that the plaintiffs in
 13 either of those actions have raised a product liability claim implicating any Cementaid product. To
 14 the contrary, Glacier’s boilerplate allegations regarding the Millennium Tower Action are limited
 15 to a single sentence, which asserts only that the plaintiff “alleges numerous problems with the
 16 condition of the Millennium Tower including, but not limited to water intrusion through foundation
 17 systems and slabs.” Complaint ¶ 7. Glacier’s allegations regarding the Axis litigation are even
 18 vaguer, stating only that the plaintiff “alleges numerous problems with the condition of the Axis
 19 project including, but not limited to, water intrusion.” *Id.* ¶ 12. Notably, Glacier does not assert
 20 that the plaintiffs in the Millennium Tower Action and the Axis Action identified a single
 21 Cementaid product in their pleadings, much less that they raised a product liability claim against
 22 any Cementaid product.

23 Likewise, Glacier does not plead any facts suggesting that Webcor’s cross-complaints
 24 allege a product liability claim concerning any Cementaid product. Glacier states that it was
 25 “named as a cross-defendant in the Webcor cross-complaint[s],” and that it is “informed and
 26 believes that its only relationship to Webcor . . . is the sale of Cementaid’s product to Central
 27 Concrete which subsequently utilized that product in concrete work.” *Id.* ¶¶ 8, 13. But as before,

1 Glacier does not allege that Webcor (1) identified any Cementaid product in its cross-complaints,
 2 (2) raised a product liability claim ascribed to any Cementaid product, or (3) explained how any
 3 Cementaid product was allegedly implicated in the plaintiffs' underlying pleadings. In fact, the
 4 Webcor cross-complaint does not allege any product liability claims against a Cementaid product.

5 Aside from these conclusory allegations, the Complaint provides no other assertions that
 6 any Cementaid product is implicated in the underlying pleadings, or explain how the underlying
 7 pleadings raise a product liability claim. Nor does Glacier concede how it ultimately could be
 8 found liable, much less demonstrate how any potential liability would necessarily transfer to
 9 Cementaid.

10 **III. Legal Standard**

11 To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a complaint
 12 must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible
 13 on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (*citing Bell Atl. Corp. v. Twombly*, 550
 14 U.S. 544, 570 (2007)); *Dri-Eaz Prods., Inc., v. Dan Duc Nguyen*, Case No. C11-1654Z, 2012 WL
 15 1537598, at *1 (W.D. Wash. May 1, 2012). To be facially plausible, such "'factual content [must]
 16 allow[] the court to draw the reasonable inference' that a party is liable for the misconduct alleged."
 17 *Cascade Designs Inc., v. Windcatcher Tech. LLC*, Case No. C15-1310, 2016 WL 374564, at *1
 18 (W.D. Wash. Feb. 1, 2016) (*citing Iqbal*, 556 U.S. at 678). Importantly, "[t]he plaintiff is obligated
 19 to provide grounds for his entitlement to relief that amount to more than labels and conclusions or
 20 a formulaic recitation of the elements of a cause of action." *Dri-Eaz*, 2012 WL 1537598, at *1
 21 (*citing Twombly*, 550 U.S. at 545).

22 While a court must assume the truth of all well-pleaded allegations, "[m]ere 'conclusory
 23 allegations of law and unwarranted inferences are insufficient to defeat a motion to dismiss.'"
 24 *Cascade*, 2016 WL 374564, at *1 (*citing Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004)).
 25 "A court may also dismiss a claim that lacks a cognizable legal theory, or the absence of sufficient
 26 facts to form a cognizable legal theory." *Dri-Eaz*, 2012 WL 1537598, at *1 (citation omitted). In
 27

1 deciding a motion to dismiss, a court may also “look beyond a party’s complaint to matters of public
 2 record.” *Cascade*, 2016 WL 374564, at *1 (citation omitted).

3 **IV. Glacier’s Second And Fourth Causes Of Action For Breach Of Contract Should
 4 Be Dismissed Because Glacier Has Not Pled Any Facts Showing That Cementaid
 Breached A Duty Imposed By The Agreement**

5 “Indemnity agreements are subject to the fundamental rules of contract construction, i.e.,
 6 the intent of the parties controls; this intent must be inferred from the contract as a whole; the
 7 meaning afforded the provision and the whole contract must be reasonable and consistent with the
 8 purpose of the overall undertaking[.]” *Knipschield v. C-J Recreation, Inc.*, 74 Wash. App. 212,
 9 215 (Wash. Ct. App. 1994) (citation omitted). “[C]lauses purporting to exculpate an indemnitee
 10 from liability flowing solely from its own acts or omissions are not favored and are strictly
 11 construed.” *Id.* Further, “ambiguous indemnity contracts are construed against the indemnitee.”
 12 *Calkins v. Lorain Div. of Koehring Co.*, 26 Wash. App. 206, 210 (Wash. Ct. App. 1980).

13 A breach of contract claim “requires a showing of ‘(1) a contract that imposed a duty, (2)
 14 breach of that duty, and (3) an economic loss as a result of the breach.’” *Cascade*, 2016 WL 374564,
 15 at *3 (citing *Myers v. State*, 152 Wash. App. 823, 827-828 (Wash. Ct. App. 2009)). Here, the
 16 Complaint appears to allege that Cementaid breached two duties in relation to the Millennium
 17 Tower and Axis Actions: (1) a duty to defend Glacier, and (2) a duty to indemnify Glacier. *See*,
 18 *e.g.*, Complaint ¶¶ 10, 15, 19, 25 (reciting an alleged “obligation to indemnify Glacier”);
 19 *id.* ¶ 20, 26 (reciting an alleged obligation to “defend and indemnify” Glacier). But Glacier has not
 20 pled any facts demonstrating that the Millennium Tower and Axis Actions involve a product
 21 liability claim—the only type of claim that Cementaid is contractually obligated to defend and
 22 indemnify. And even if the Complaint was sufficient to raise a colorable product liability claim,
 23 Glacier has not pled any facts showing that Cementaid’s alleged duty to defend and indemnify have
 24 arisen. As such, the Complaint must be dismissed.

A. Glacier Has Not Pled Any Facts Showing That The Underlying Proceedings Raise A Product Liability Claim That Would Invoke Cementaid's Alleged Duty To Defend

Glacier acknowledges that Cementaid’s alleged duty to defend and indemnify Glacier—to the extent it is applicable at all—is limited to “product liability” claims. Under California law,¹ a plaintiff may only raise a product liability claim “on the theory of strict liability in tort or on the theory of negligence.” *Lemberg v. JPMorgan Chase Bank, N.A.*, Case No. 17-cv-05241, 2018 WL 1046886, at *2 (N.D. Cal. Feb. 26, 2018) (granting motion to dismiss product liability claim for failing to plead sufficient factual information). To plead a strict product liability claim, the plaintiff must allege facts showing either a manufacturing defect, a design defect, or a warning defect in the product. *Id.*; *Mountain Club Owner’s Assoc. v. Graybar Elec. Co., Inc.*, Case No. No. 2:13–1835, 2014 WL 130767, at * 2 (E.D. Cal. Jan. 14, 2014) (“Plaintiff’s failure to identify the alleged defect in the electrical cable is fatal to its strict liability claim.”). Alternatively, “[t]o prevail on a negligence products liability claim, a plaintiff must show that the defendant owed her a legal duty, that the defendant breached the duty, and that the breach was a proximate or legal cause of his injuries.” *Lemberg*, 2018 WL 1046886, at *2 (citation omitted). Under a negligence theory, the plaintiff must also demonstrate ““that the defect in the product was due to negligence of the defendant.”” *Id.* (citations omitted). Regardless of which theory is ultimately pled, “a bare allegation that a product is defective is an insufficient legal conclusion.” *Id.*; *Mountain Club*, 2014 WL 130767, at * 1.

Here, the Complaint is devoid of any facts demonstrating that a product liability claim implicating Cementaid's products has been raised in either the Millennium Tower or Axis Actions. For example, Glacier contends that the plaintiff in the underlying Millennium Tower Action alleges "numerous problems with the condition of the Millennium Tower including, but not limited to, water intrusion through foundation systems and slabs." Complaint ¶ 7. Glacier similarly asserts

¹ Due to the conclusory nature of Glacier's allegations, and the lack of any facts regarding the alleged "product liability claim," Cementaid can only speculate that any such claim would be brought under California law, where the Millennium Tower and Axis Actions are pending. Glacier's failure to plead this basic information further underscores the deficiencies in the Complaint.

1 that the plaintiff in the underlying Axis Action alleges “numerous problems with the condition of
 2 the Axis project including, but not limited to, water intrusion.” *Id.* ¶ 12. But these allegations do
 3 not suggest that the plaintiffs in either action have identified a Cementaid product in their
 4 underlying pleadings (indeed, they have not). Nor do these allegations (1) say anything about a
 5 “product liability claim” being raised against any Cementaid product, (2) identify the alleged theory
 6 (strict liability or negligence) pursuant to which the product liability claim was allegedly raised, or
 7 (3) provide even the most rudimentary information regarding a single required element of a product
 8 liability claim under any theory. As such, the Complaint fails to allege any facts that would allow
 9 Cementaid, or the Court, to plausibly infer that a product liability claim has been raised, thereby
 10 implicating a duty to defend and indemnify Glacier pursuant to the Agreement. *Mountain Club*,
 11 2014 WL 130767, at *1 (dismissing product liability claim where the plaintiff “does not identify
 12 the particular type of [product] or the alleged defect, let alone explain how the [product] was
 13 defective or how that defect resulted in a fire on plaintiff’s property.”).

14 Indeed, the Complaint is further undermined and should be dismissed because Glacier has
 15 argued in the Millennium Tower litigation the same precise points that Cementaid raises here, thus
 16 demonstrating that a product liability claim has not been raised in the plaintiffs’ underlying
 17 pleadings. Specifically, Glacier argues, in publicly available Court filings, that the plaintiff in the
 18 Millennium Tower Action has only “alleged defective design and construction of a residential high-
 19 rise” but “has not alleged that Glacier is at fault for the defective design and construction of the
 20 high-rise.” Request for Judicial Notice (“RJN”), Ex. 5, 3:7-9, 6:8-9 (emphasis added) (Glacier’s
 21 Motion to Quash).

22 Likewise, Glacier pleads no facts showing that Webcor’s cross-complaints raise a product
 23 liability claim involving a Cementaid product. To the contrary, Glacier alleges only that it is named
 24 in the cross-complaints filed by Webcor, and that it is “informed and believes” that its only relation
 25 to Webcor as it relates to either project “is the sale of Cementaid’s product to Central Concrete.”
 26 Complaint ¶¶ 8, 13. As with its allegations regarding the underlying complaints, Glacier does not
 27 contend that Webcor identified any Cementaid product in its pleadings, allege that Webcor raised

1 a product liability claim as to any Cementaid product, or explain the theory or elements upon which
 2 that alleged product liability claim is supposedly based. Indeed, by Glacier's own admission, "the
 3 sole reference to Glacier [in Webcor's cross-complaint] is that Glacier is a Washington Corporation
 4 that was doing business in California at all relevant times." RJD, Ex. 5, Declaration of J. Michael
 5 Grimm, at 1 (Glacier's Motion to Quash).

6 Moreover, while Glacier makes only two references to the "Caltite" product,
 7 Complaint ¶ 5, 6, at no point does Glacier allege that the Millennium Tower plaintiffs, the Axis
 8 plaintiffs, or Webcor identified Caltite (or any other Cementaid product) in their pleadings, much
 9 less that their pleadings pled the elements of either a strict liability or a negligent product liability
 10 claim as to Caltite, or explained how Caltite allegedly contributed to any purported construction
 11 defects. In fact, as Glacier itself has explained in the Millennium Tower Action, "[m]erely
 12 supplying a product . . . bears no causal connection the design and construction defects which are
 13 causing the Millennium Towers to displace." RJD, Ex. 5, at 6:25-26 (Glacier's Motion to Quash).

14 Accordingly, the "facts alleged . . . on the face of [Glacier's] complaint . . . are patently
 15 insufficient to impose a duty to defend," since there is "no allegation whatsoever which would link
 16 [Cementaid] . . . to the events leading to the filing of the complaint." *Parks v. W. Wash. Fair Ass'n*,
 17 15 Wash. App. 852, 856 (Wash. Ct. App. 1976); *Hay v. Tollen*, 4 Wash. App. 2d 1036, at *6 (Wash.
 18 Ct. App. 2018) (unpublished) (finding no duty to defend where a construction defect complaint
 19 "did not specify how the water penetration occurred, or specifically what defects existed," and "did
 20 not allege that [Defendant's] framing subcontractors had caused the defects."). On that basis alone,
 21 Glacier's causes of action for breach of contract are inadequately pled and should be dismissed.

22 **B. Glacier Has Not Pled Any Facts Showing That The Duty To Defend And The
 23 Duty To Indemnify Have Arisen**

24 Even if the Complaint raised a colorable product liability claim—which it does not—it
 25 should still be dismissed. It is well established that "[t]he duty to defend and the duty to indemnify
 26 arise at different times in a tort proceeding." *Knipschild*, 74 Wash. App. at 215 (citation omitted).
 27 In this case, Glacier has not pled any facts demonstrating that the alleged duties to defend and

indemnify have arisen. For this additional reason, it has failed to state a cause of action for breach of contract.

1. Glacier Cannot Plead A Breach Of The Duty To Defend Because The Complaint Contains No Facts Demonstrating That Liability Would Eventually Fall On Cementaid

To show entitlement to a duty to defend, the facts at the time of tender “must demonstrate that liability would eventually fall upon the indemnitor, thereby placing it under a duty to defend.” *Knipschield*, 74 Wash. App. at 216 (citations omitted) (emphasis added); *Dixon v. Fiat-Roosevelt Motors, Inc.*, 8 Wash. App. 689, 694 (Wash. Ct. App. 1973).² Here, Glacier cannot state a claim for breach of the duty to defend because it has not alleged any facts that “necessarily demonstrate that liability would eventually fall upon [Cementaid].” *Dixon*, 8 Wash. App at 694 (emphasis added).

The Complaint does not allege—much less plead facts to support an allegation—that Cementaid would eventually be liable for any damages in the Millennium Tower Action or the Axis Action. As explained above, neither the plaintiffs’ underlying pleadings, nor Webcor’s cross-complaints, identify any Cementaid product, state a product liability claim against any Cementaid product, or allege that any Cementaid product is related to any of the alleged issues recited in the underlying complaints or cross-complaints. Nor does Glacier make any attempt to connect plaintiffs’ and Webcor’s allegations to Cementaid, or provide any facts to explain how they potentially implicate any Cementaid product. As such, the Complaint does not plausibly allege that Cementaid will necessarily be found liable in the underlying actions. *Hay v. Tollen*, 4 Wash. App. 2d 1036, at *7 (finding no duty to defend where “[t]he record contains only general allegations that houses in the project sustained water damage without identifying the source of that water damage or whether the work by [Defendants] was related in any fashion to the source.”); *Ballard Residential, LLC v. Pac. Rim Framing Co., Inc.*, 149 Wash. App. 1060, at *6 (Wash. Ct. App. 2009)

² Unlike an insurance policy, the mere *potential* for liability does not trigger a duty to defend pursuant to a contractual defense and indemnity clause. *Hay v. Tollen*, 4 Wash. App. 2d 1036, at *6, n.6 (“The trigger for a duty to defend for standard contract is different than the duty to defend applied to insurance contracts.”); *Knipschield*, 74 Wash. App. at 216 & n.3 (contrasting a contractual duty to defend with the duty to defend in the insurance context).

1 (unpublished) (finding no duty to defend where the plaintiff “failed to provide evidence of a causal
 2 connection between Pacific Rim’s narrow scope of work regarding Tyvek and the documented
 3 water damage.”).

4 To the contrary, to the extent that the threadbare allegations in the Complaint allow any
 5 plausible inference, it is that Glacier *cannot* plead any facts showing that liability in the underlying
 6 actions would necessarily fall on Cementaid. As Glacier acknowledges, Cementaid’s limited duty
 7 to defend is only implicated by a product liability claim. In contrast, Glacier is liable for, and must
 8 defend and indemnify Cementaid against, any and all claims involving Glacier’s negligent or
 9 intentional acts “with regard to [Glacier’s] shipping, transport, storage, distribution, sale or use” of
 10 Cementaid’s products. Schuettenhelm Decl. ¶ 6 (emphasis added). As Glacier acknowledges, its
 11 alleged connection to the Millennium Tower and Axis Actions involves “the sale of Cementaid’s
 12 products to Central Concrete.” Complaint ¶ 8, 13 (emphasis added).³ Thus, because the underlying
 13 actions involve Glacier’s sale of Cementaid products—thereby potentially implicating Glacier’s
 14 sole liability under the Agreement—Glacier cannot “demonstrate that [Cementaid] would
 15 eventually be liable for plaintiff’s injury if [Glacier] was found liable.” *Dixon*, 8 Wash. App at 694
 16 (noting that since “Fiat’s position as the retailer and A.R.E.’s position as the manufacturer are in
 17 conflict,” the duty to defend was not implicated).

18 Glacier’s inability to plead that liability would necessarily fall on Cementaid is further
 19 underscored by Glacier’s statements in the underlying actions. For example, in the Millennium
 20 Tower Action, Glacier has stated that it is only “named in [Webcor’s] cross-complaint in the event
 21 that Webcor is found to have some liability in the underlying action.” RJN, Ex. 5, at 6:6-8 (Motion
 22 to Quash). Thus, by Glacier’s own admission, there is only a *potential* for a finding of liability
 23 against it, which is itself contingent on the *potential* for a finding of liability against Webcor. This

24 ³ Because this motion is based on the underlying pleadings, Cementaid does not, at this time, rely on any of the facts
 25 revealed during discovery in the underlying litigations. Nonetheless, Cementaid notes that Glacier’s representation
 26 that it only “sold” Cementaid’s products is, at best, incomplete. Indeed, discovery in the underlying actions
 27 demonstrates that Glacier had extensive involvement in, and approved and oversaw, various aspects of the projects.
 Thus, to the extent that the Court allows Glacier to amend its Complaint yet again, Cementaid anticipates moving
 promptly for summary judgment as the facts plainly demonstrate that Glacier cannot, as a matter of law, succeed in
 demonstrating that Cementaid has a duty to defend Glacier.

1 attenuated chain of “potential” liability does not support a plausible inference that liability would
 2 necessarily fall on Cementaid, thus triggering a duty to defend. And as explained above, Glacier
 3 has noted that the plaintiff in the Millennium Tower Action “has not alleged that Glacier is at fault
 4 for the defective design and construction of the high-rise,” and that “[m]erely supplying a
 5 product . . . bears no causal connection the design and construction defects which are causing the
 6 Millennium Towers to displace.” *Id.* at 6:8-9 & 25-26. In view of these assertions, Glacier cannot
 7 now contend that any liability would necessarily flow to Cementaid.

8 In sum, Glacier has not pled any facts demonstrating that liability “would eventually fall
 9 upon [Cementaid], thereby placing it under a duty to defend.” *Knipschield* at 74 Wash. App. at 216
 10 (citations omitted). As a result, it cannot state a claim against Cementaid for breach of any duty to
 11 defend.

12 **2. Glacier Cannot Plead A Breach Of The Duty To Indemnify Because
 13 The Parties In The Underlying Action Have Not Prevailed**

14 Under Washington law, the duty to indemnify only “arises when the plaintiff in the
 15 underlying action prevails on facts that fall within coverage.” *Knipschield*, 74 Wash. App. at 216
 16 (citations omitted); *Parks*, 15 Wash. App. at 855 (“Only if the indemnitor can be said to have
 17 breached that duty [to defend] can it be held liable for the indemnitee’s costs of defending the
 18 lawsuit”).

19 Here, Glacier cannot plead that the underlying plaintiffs or Webcor have prevailed against
 20 it in either the Millennium Tower Action or the Axis Action. As the Complaint demonstrates, those
 21 actions are currently ongoing and no judgments have been rendered against Glacier. *See*
 22 Complaint ¶¶ 18, 24 (noting that Glacier’s defense in those cases is “continuing” and that it
 23 “may . . . be obligated to pay the costs of a settlement or judgment” in the future.”). Accordingly,
 24 Glacier cannot state a claim against Cementaid for breach of a duty to indemnify.

1 **V. In The Absence of A Cause Of Action For Breach Of Contract, Glacier's First And**
 2 **Third Causes Of Action For Declaratory Judgment Must Be Dismissed**

3 “It is well established that the Declaratory Judgment Act ‘does not create an independent
 4 cause of action.’” *Hummel v. Nw. Tr. Servs., Inc.*, 180 F. Supp. 3d 798, 810 (W.D. Wash. 2016)
 5 (citations omitted). “As such, in the absence of a substantive cause of action, the Court cannot
 6 grant declaratory relief.” *Id.*; *Krasucki v. Nationstar Mortg., LLC*, Case No. C15-0229JLR, 2015
 7 WL 11251850, at *4 (W.D. Wash. July 8, 2015) (“A declaratory judgment is a remedy, not a cause
 8 of action or theory of recovery.”) (citations omitted); *Minnick v. Clearwire US, LLC*, 683 F. Supp.
 9 2d 1179, 1188-89 (W.D. Wash. 2010) (“Plaintiffs’ cause of action for declaratory relief rises and
 10 falls with the remainder of the complaint.”).

11 As explained above, the Complaint fails to state a claim for breach of contract. Thus,
 12 because Glacier’s claim for breach of contract fails, so must its claim for declaratory judgment
 13 since it is derivative of its flawed contract claims. *Krasucki*, 2015 WL 11251850, at *4
 14 (“[D]eclaratory relief will not be granted where the request for declaratory relief is derivative of an
 15 underlying claim and that underlying claim fails.”) (citations omitted); *Hummel*, 180 F. Supp. 3d at
 16 810-11 (holding that since the court dismissed the Plaintiff’s other claims, “it must dismiss
 17 Plaintiff’s declaratory relief claim as well.”).

18 **VI. Conclusion**

19 For the foregoing reasons, Cementaid respectfully requests that the Court dismiss the
 20 Complaint for failure to state a cause of action pursuant to Federal Rule of Civil Procedure 12(b)(6).

21
 22 Dated: November 21, 2018

23
 24 Respectfully submitted,

25
 26 **BRACEWELL LLP**

27
 28 By: /s/ Philip J. Bezanson
 29 Philip J. Bezanson, WSBA No. 50892
 30 Jared D. Schuettenhelm, WSBA No. 46181
 31 701 Fifth Avenue, Suite 6200
 32 Seattle, WA 98104-7043

Telephone: (206) 204-6200
Facsimile: (800) 404-3970
philip.bezanson@bracewell.com
jared.schuettenhelm@bracewell.com

Richard F. Whiteley (*pro hac vice* pending)
Stacianne M. Wilson (*pro hac vice* pending)
711 Louisiana Street, Suite 2300
Houston, TX 77002-2770
Telephone: (713) 221-1123
Facsimile: (800) 404-3970
richard.whiteley@bracewell.com
staci.wilson@bracewell.com

*Attorneys for Cementaid International
Marketing, Ltd.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on November 21, 2018 to all counsel of record who have consented to electronic service via the Court's CM/ECF system.

/s/ Philip J. Bezanson

Philip J. Bezanson